TERZA HOPSON ET AL.

IBLA 70-97 Decided August 20, 1971

Alaska: Native Allotments--Indian Allotments on Public Domain: Lands Subject to--Naval Petroleum Reserves--Withdrawals and Reservations: Effect of--Withdrawals and Reservations: Revocation and Restoration

> Lands within Naval Petroleum Reserve No. 4 in Alaska withdrawn from entry by Public Land Order No. 82 were expressly precluded from being opened to entry by Public Land Order No. 2215, which revoked Public Land Order No. 82; therefore, the withdrawal by Public Land Order No. 82 remains in effect as to such lands and precludes the allowance of native allotment applications for such lands unless the lands applied for were otherwise excepted from the withdrawal or unless rights had attached.

Naval Petroleum Reserves

> By an agreement between the Departments of Interior and Navy, no grants of surface interests in lands within Naval Petroleum Reserve No. 4 in Alaska may be made by the Bureau of Land Management without prior concurrence of the Office of Naval Petroleum Reserves and subject to such terms and conditions as that office may specify to protect the petroleum reserves.

Alaska: Native Allotments--Indian Allotments on Public Domain: Generally--Indian Lands: Aboriginal Title--Withdrawals and Reservations: Generally

> Where there has been no Governmental recognition of proprietary rights in lands occupied by Alaska natives, the United States may withdraw such lands from disposition under the public land laws, including the Alaska Native Allotment Act.

Alaska: Native Allotments--Indian Allotments on Public Domain: Generally
Naval Petroleum Reserves--Withdrawals and Reservations: Generally

> The strong Congressional policy of protecting the naval petroleum reserves compels the rejection of native allotment applications for lands within Naval Petroleum Reserve No. 4 in Alaska in the exercise of the Secretary of the Interior's discretion under the Alaska Native Allotment Act, regardless of whether asserted inchoate occupancy preference rights under that Act are deemed unaffected or precluded by the reserve and subsequent withdrawals.

IBLA 70-97	:	F-11719 etc.
TERZA HOPSON ET AL.	:	Native allotment
	:	applications rejected
	:	Affirmed as modified

DECISION

This appeal is by five applicants for Alaska native allotments pursuant to the Alaska Native Allotment Act of May 17, 1906, as amended, 48 U.S.C. § 357 (1958). The applications were rejected by separate decisions of the Fairbanks district and land office, dated May 13, 1969, on the ground that the lands included within the applications are entirely within Naval Petroleum Reserve No. 4 established by Executive Order No. 3797-A of February 27, 1923, and that the lands within that petroleum reserve are under the jurisdiction of the Department of the Navy. By decision dated October 1, 1969, consolidating the cases, the Office of Appeals and Hearings, Bureau of Land Management, affirmed those decisions on the ground that the lands were appropriated for Naval Petroleum Reserve No. 4 (hereafter referred to as NPR 4) at the time of the claimed occupancy, that they were not subject to occupancy on the dates indicated by the appellants nor available for allotment to them, and that the Department of Navy has jurisdiction over the lands. 1/

The applicant-appellants and the Fairbanks district and land office number of their applications are as follows:

Terra Hopson	F-11719
Steve Hopson, Sr.	F-11720
Gerald Sakeagak	F-11725
Otis Ahkivgak	F-11953
Thomas P. Brower	F-11957

1/ The Bureau's decision was captioned Deva Ahvakana et al., Fairbanks 11716, etc. Four of the nine applicant-appellants in the Bureau's decision have not appealed to the Secretary.

All of the applications were filed in 1969 and showed use of the land for fishing, trapping, or hunting camps. Terra Hopson, Steve Hopson, and Gerald Sakeagak claimed occupancy (using tents) from 1932 to the present time, with no improvements upon the land. Otis Ahkivgak's application indicated he has occupied the land since May 1, 1897. He showed residence from 1897 to 1916, and improvements of campsites at a value of $1,500 made in 1900, but no occupancy since 1916. Thomas P. Brower indicated in his application that the land had been used by his family and ancestors for the past 2,000 years; specifically, he stated his own continuous use from 1927 through 1967, including use as a reindeer ranch from 1927 to 1951. His list of improvements made in 1934 included a 22' x 32' building, a cabin 9' x 16', a one-story house 38' x 26', and meat racks, at a total value of $22,500.

The appeals of the applicants are identical. First, they allege that Executive Order No. 3797-A by its own terms withdrew only oil and gas from operation of the laws at that time, but did not withdraw the land itself. Therefore, they contend, the land is still within the jurisdiction of the Department of the Interior. They note that the order stated as the reason therefor that then current laws for petroleum development were inapplicable to the area. They contend there was no intention at that time to remove the land from the public domain, but only to protect a subsurface resource.

Second, the appellants contend that in any event the order could have had no effect as to these lands. They state that the land has been handed down from father to son for generations and has been in substantial, continuous use and occupancy by natives before, at the time of, and since issuance of Executive Order No. 3797-A. They assert that lands occupied by natives are not a part of the public domain and therefore could not be withdrawn from it, nor could the land be transferred to the Department of Navy. In support of this contention, they refer to the case of Yakutat and Southern Ry. v. Setuck Harry, Heir of Setuck Jim, 48 L.D. 362 (1921). That case, they assert, ruled that the applicant had a prima facie right to the land as native occupancy excepted land occupied prior to inclusion in a national forest from operation of the forest reserve. They contend, therefore, that jurisdiction of the land within NPR 4 similarly is still in the Secretary of the Interior, and request that their applications be accepted and processed in the normal manner.

In deciding whether appellant's requests should be granted, a background review of the status of the land is essential.

Executive Order No. 3797-A set aside certain lands in Alaska, including those covered by these applications, for the naval petroleum reserve. As appellants have asserted, the order stated that there were large see pages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast,

> . . . that the present laws designed to promote development seem imperfectly applicable in the region because of its distance, difficulties, and large expense of development; and that the future supply of oil for the Navy is at all times a matter of national concern.

Therefore, lands, except those then covered by valid entry, lease, or application, were set apart as a naval petroleum reserve. The last paragraph of the order stated:

> The reservation hereby established shall be for oil and gas only and shall not interfere with the use of the lands or waters within the area indicated for any legal purpose not inconsistent therewith. 2/

The decisions below did not so indicate, but it appears from the record, especially the description of the land from the plats in the records, that all of these lands are within other withdrawals, including Public Land Order No. 82, 8 F.R. 1599 (February 4, 1943) (hereafter referred to as PLO 82), whereby the Secretary of the Interior,"subject to valid existing rights," withdrew all public lands in a certain designated area of Northern Alaska for use in connection with the prosecution of the war. This order withdrew the lands from sale, location, selection, and entry under the public land laws of the United States, and also reserved the minerals in such lands. It indicated that the order would not affect or modify existing reservations of any of the lands involved except to the extent necessary to prevent the sale, location, selection, or entry of the lands under the public land laws, including the mining laws, and the leasing of the lands under the mineral leasing laws.

2/ By Public Land Order No. 289, 10 F.R. 19479 (July 31, 1945), Executive Order No. 3797-A was amended to omit the penultimate paragraph which had provided as follows:

"Said lands to be so reserved for six years for classification, examination, and preparation of plans for development and until otherwise ordered by the Congress or the President."

By Public Land Order No. 2215, 25 F.R. 12599 (December 8, 1960) (PLO 2215), PLO 82 was revoked and the lands were opened to entry, except as to the lands that were within NPR 4 and the Arctic Wildlife Refuge. The order stated that jurisdiction over the lands within NPR 4 was vested in the Department of the Navy by the act of August 19, 1956, 10 U.S.C. §§ 7421-38 (1964), and that these lands, therefore, were not affected by the opening.

In rejecting these applications, the land office relied on an informal memorandum opinion by the Associate Solicitor for Public Lands, dated October 18, 1968, as to the effect of PLO 2215 upon NPR 4. This opinion concluded that PLO 2215 revoked PLO 82 in its entirety and opened to disposition the lands formerly subject to that order, except those in NPR 4 and the Arctic Wildlife Refuge Range. It stated that revocation of PLO 82 had no discernible effect upon the lands in NPR 4, except that of clearing the records. It specifically mentioned the statement in PLO 2215 regarding the jurisdiction of the lands in the petroleum reserve being vested in the Department of the Navy, and stated that for this reason the Secretary could not open the lands in NPR 4.

Even assuming arguendo, as appellants contend, that Executive Order No. 3797-A by itself withdrew only the oil and gas and did not bar other dispositions of the land, it is apparent, regardless of the reason stated in PLO 2215, that the express exception of the lands within NPR 4 from the opening order left the withdrawal under PLO 82 in effect as to lands within the reserve. It is a general principle of public land law that until a withdrawal is revoked and land restored to entry by an opening order, such land is not subject to appropriation or disposal. Roy Leonard Wilbur, Robert Montgomery Tubb, 61 I.D. 157 (1953); cf. Theodore A. Velanis, A-30953 (March 7, 1969). The withdrawal by PLO 82 would preclude the granting of native allotments for land still subject to the order, unless it could be determined that the excepting language of the order, "subject to valid existing rights," applies, or that the land is not within the categorization of "public lands" because of native occupancy, as appellants contend, although that contention was specifically with respect to Executive Order No. 3797-A. That order set apart "all of the public lands . . . not now covered by valid entry, lease or application."

The jurisdictional question raised because of the rulings below relates not only to the effect of Executive Order No. 3797-A, but also to the effect of statutes pertaining to the naval petroleum reserves. The act of August 10, 1956, cited in the decisions below as vesting jurisdiction of these lands in the Department of Navy, was

primarily a recodification and renumbering of existing statutory provisions pertaining to the military. Formerly, the provisions with respect to the naval petroleum reserves were codified at 34 U.S.C. § 524 (1952).

Congress had provided in sec. 1 of the Navy Appropriations Act of June 4, 1920, ch. 228, 41 Stat. 813, as follows:

> Provided, That the Secretary of the Navy is directed to take the possession of all properties within the naval petroleum reserves as are or may become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled "An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States: And provided further, That the rights of any claimant under said Act of February 25, 1920, are not affected adversely thereby . . .

Except for claims or applications under the Mineral Leasing Act of February 25, 1920, now as revised and amended, 30 U.S.C. §§ 181 et seq. (1964), the Navy Appropriations Act of June 4, 1920, specifically excluded only "pending applications for United States patent under any law," evincing less recognition to inchoate settlement or occupancy claims than the executive order.

The act of June 4, 1920, was amended by the acts of June 30, 1938, ch. 851, 52 Stat. 1252; June 17, 1944, ch. 262, 58 Stat. 280; July 6, 1945, ch. 282, 59 Stat. 465; and August 8, 1946, ch. 916, 60 Stat. 958. The amendatory acts expanded the authority and control of the Secretary of the Navy over the petroleum reserves and the use and leasing of minerals from certain of the reserves (not No. 4), subject to restrictions and approval by Congress. The recodification by the act of August 10, 1956, retained, with a minor change in language, the first phrase of the act of June 4, 1920, quoted above. See 10 U.S.C. § 7421(a) (1964). As the Supreme Court has stated, the act of June 4, 1920,

and other Congressional manifestations, prescribe a strong policy of the United States to conserve the petroleum resources within the naval petroleum reserves. Mammoth Oil Co. v. United States, 275 U.S. 13, 34 (1927); Pan American Petroleum and Transport Co. v. United States, 273 U.S. 456, 501 (1927). Because of this legislation the administration over the petroleum reserves vested in the Secretary of Navy and, without Congressional action, could not be transferred to the Secretary of Interior. United States v. Pan-American Petroleum Co., 55 F.2d 753 (9th Cir.), cert. denied, 287 U.S. 612 (1932).

However, in Standard Oil Co. of California v. United States, 107 F.2d 402 (9th Cir.), cert. denied, 309 U.S. 654, 673, rehearing denied, 309 U.S. 697 (1940), the court rejected the contention that because land was within a naval petroleum reserve and the Secretary of Navy had been given control over naval reserves by the act of June 4, 1920, this removed all reserve land from the jurisdiction of the Department of Interior. Instead, the court found that the Secretary of Interior had jurisdiction to determine whether the lands were mineral in character and had passed to the State of California before they were placed within a naval petroleum reserve.

It is absolutely clear that the Secretary of Navy has jurisdiction and administration over the petroleum resources within NPR 4 subject to control by Congress. However, it would also seem from Standard Oil, supra, that the Department of Interior retains its usual jurisdiction to determine the status of the land at the time the petroleum reserve was created and subsequent orders issued affecting the status of the land.

A "Memorandum of Agreement" between the Office of Naval Petroleum Reserves and the Bureau of Land Management recognizes that there is a "joint nature" of jurisdiction by the Departments of Navy and Interior over lands within the reserve. See Bureau of Land Management Manual, Vol. V, Lands, Chap. 4.9, App. 1. By this agreement, revocable use permits or licenses for surface uses are issued by the Office of Naval Petroleum Reserves without reference to the Bureau of Land Management. However, surface uses and interests in the land not terminable at will are granted by the Bureau of Land Management only with the prior concurrence of the Office of Naval Petroleum Reserves and subject to such additional terms and conditions as that

Office may specify. 3/ Therefore, assuming no other objections and that an allotment could come within this understanding (but see infra), a native allotment application could not be allowed within the reserve without the consent of the Office of Naval Petroleum Reserves and subject to whatever conditions and terms it might impose. There is no indication in the record that the Office of Naval Petroleum Reserves was consulted about these applications. However, in view of our conclusions, infra, such consultation would serve no useful purpose.

3/ The agreement provides as follows:

"a. In any case where the needs of an applicant for the surface use of lands in Naval Petroleum Reserve No. 4 may be met by a revocable use permit or license, such permit or license will be requested from, and issued by, the Office of Naval Petroleum Reserves without reference to the Bureau of Land Management.

"b. In any case where the needs of an applicant for the use of lands in Naval Petroleum Reserve No. 4 would be properly met by the withdrawal of the lands for such use, or by the grant of licenses, easements, rights-of-way, or similar interests in the land not terminable at will, such use shall be requested from the Bureau of Land Management in accordance with the regulations of the Secretary of the Interior. No rights will be granted by the Department of the Interior in response to such requests without the prior concurrence of the Office of Naval Petroleum Reserves and any rights so granted will be subject to such additional terms and conditions as such Office may specify.

"c. Applications under the mineral leasing laws, other than for oil and gas, or for the sale of materials under the act of July 31, 1947 (61 Stat. 681; 69 Stat. 367; 30 U.S.C. 601-4) as amended, or for the use or disposal of surface resources as provided by law, shall be processed in the same manner as provided in paragraph numbered 5(b) of this agreement and no such minerals or materials shall be disposed of except under those or applicable laws.

"d. The Office of Naval Petroleum Reserves will have exclusive jurisdiction over the oil and gas deposits in lands within the Reserve.

"e. The Department of the Interior will retain its jurisdiction over the Indians and Eskimos within Naval Petroleum Reserve No. 4 and the Department of the Interior and the Navy will not disturb such natives in their traditional occupancy of the lands within the reserve or their traditional use of the mineral, surface, fish, and wildlife resources therein."

With this background of executive and legislative actions affecting the lands within the petroleum reserve, we come to the specific issues raised by appellants as to the effect of their occupancy. In their applications all of the applicants asserted their own, individual occupancy of the tracts at a time prior to the withdrawal by PLO 82. However, only Otis Ahkivgak specifically asserted occupancy by himself prior to Executive Order No. 3797-A, and he did not show occupancy after 1916. In their appeals, however, they all allege "substantial, continuous use and occupancy by natives" before, at the time of, and since the creation of the petroleum reserve. In effect, in this appeal they are relying upon alleged aboriginal rights of occupancy in the land created by the use and occupancy of their ancestors or other natives as well as their own individual occupancy rights. They are raising the issue not only of their rights under the Alaska Native Allotment Act, but also of whether there is any inherent aboriginal right of Alaska natives to these lands which would preclude the withdrawals.

Appellants rely on Yakutat and Southern Ry. v. Setuck Harry, supra, to support their view that their and other native inchoate occupancy rights prevented the United States from withdrawing the land. This case when analyzed does not support such a broad generalization. In Yakutat, after the land was withdrawn for a national forest reserve, the native filed his native allotment application claiming occupancy prior to the creation of the forest reserve. The railway protested the allotment on the ground that part of the land applied for covered a portion of its right-of-way and terminal grounds. The decision indicated that because the land was occupied by the native prior to the forest withdrawal, he had a preference right under the Native Allotment Act of May 17, 1906, and, therefore, a prima facie right to the land. The decision did not mention it, but at that time the Forest Homestead Act of June 11, 1906, ch. 3074, 34 Stat. 233, 4/ gave a preference right to "any settler actually occupying and in good faith claiming" national forest lands prior to January 1, 1906, if qualified to make homestead entry. Yakutat simply accorded the native's preference right for a native "homestead" under the Alaska Native Allotment Act the same treatment as a valid occupancy right of a white settler.

Although Yakutat held that the forest reserve did not preclude recognition of existing native occupancy rights, the case

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4/ This act was repealed by sec. 4 of the act of October 23, 1962, P.L. 87-869, 76 Stat. 1157, 16 U.S.C. §§ 506-08 note (1964). See also 48 U.S.C. § 371 (1958), extending the homestead laws to Alaska.

recognized that the grant of the right-of-way to the railway company could be made with the allotment being subject to it, even though the right-of-way was filed for and approved subsequent to the initiation of the native occupancy but prior to the filing of the native's application. Yakutat is, therefore, more a recognition that the United States could extinguish in whole or in part inchoate native occupancy rights by granting the land to another, than it is support for the proposition that the United States could not withdraw lands occupied by natives.

That the United States can withdraw lands in Alaska occupied by natives and defeat any inchoate occupancy right is well settled. In Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285 (1955), the Supreme Court held that native occupation of land in Alaska without government recognition of ownership creates "no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." Cf. Russian-American Packing Co. v. United States, 199 U.S. 570 (1905); George Kostrometinoff, 26 L.D. 104 (1898). Thus, such lands could be withdrawn from disposition under the public land laws, including the Native Allotment Act.

The question in this case, however, is not whether any occupancy right in the applicants has been extinguished. So far as we are aware, the Departments of Interior and Navy have not acted contrary to or changed the understanding in paragraph (c) of the Memorandum of Agreement, note 3, supra, that the traditional use and occupancy of the natives within the petroleum reserve will not be disturbed. Thus appellants' use and occupancy of these lands will not be affected by this decision.

The real issue here is whether this Department in these circumstances must issue patents under the Alaska Native Allotment Act which would dispose of the fee title of these lands, assuming that the applicants otherwise meet the requirements of the act.

The Alaska Native Allotment Act of May 17, 1906, authorized the Secretary of Interior "in his discretion and under such rules as he may prescribe" to allot not to exceed 160 acres of nonmineral land in Alaska. The act also gave a preference right

for land actually occupied by the applicant. 5/ Even though occupancy may create a preference right, since allowance of an application remains within the discretion of the Secretary, an allotment application can be denied in whole or in part where there are overriding matters of public interest and concern. For example, in Frank St. Clair (On Petition), 53 I.D. 194 (1930), this Department, at the urging of the Forest Service, reduced the allowance of a native allotment for national forest lands from the 160 acres permitted by the act, and for which the applicant applied, to approximately 9 acres. Cf. Russian-American Packing Co., supra, where the Supreme Court held that an inchoate settlement claim was defeated when the United States withdrew the lands. In Udall v. Tallman, 380 U.S. 1 (1965), the Supreme Court pointed out that although the first qualified applicant under the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 et seq. (1964), had a preference right to a lease, this did not compel the Secretary of Interior to issue a lease to him as issuance of leases was within the Secretary's discretion and the Secretary could withdraw the lands from leasing for a wildlife refuge. Likewise, we believe the Secretary in the exercise of his discretionary authority under the Alaska Native Allotment Act may deny these allotment applications regardless of whether the asserted, inchoate occupancy preference rights under that act are deemed to have been extinguished by the creation of the naval petroleum reserve or the subsequent withdrawal by PLO 82, or deemed unaffected by the withdrawal and the reserve.

5/ By the act of August 2, 1956, ch. 891, 70 Stat. 954, the act was amended to provide, inter alia, that no allotment shall be made until the person makes proof satisfactory to the Secretary of Interior of "substantially continuous use and occupancy of the land for a period of five years." It did not change the preference right. The amendatory act also added the words "vacant, unappropriated and unreserved land". The legislative history included in S. Rep. No. 2696, 84th Cong., 2d Sess., and H.R. Rep. No. 2534, 84th Cong., 2d Sess. (1956), contain letters from the then Assistant Secretary of the Interior which stated that it had been the consistent administrative interpretation of the act that the lands be vacant, unappropriated and unreserved.

The amendatory act of August 2, 1956, also provided that "vacant, unappropriated and unreserved land in Alaska that may be valuable for coal, oil or gas deposits may be allotted" subject to the provisions of the act of March 8, 1922, ch. 96, 42 Stat. 415, 48 U.S.C. §§ 376-77 (1958). the amendments raise a question which we need only note as to whether these provisions by themselves would preclude allowance of applications for lands within the petroleum reserve because it is "reserved" land.

Even though the Alaska Native Allotment Act has been amended by the act of August 2, 1956, to permit allotments for land valuable for oil and gas if the appropriate reservation of those minerals is made to the United States (see note 5, supra), such a reservation may not be sufficient to meet the purposes of the naval petroleum reserve. It is evident from PLO 2215 that this Department has long considered the lands within NPR 4 to be unavailable for disposition under the public land laws. The Memorandum of Agreement between this Department and the Department of Navy, note 3, supra, does not reflect any understanding that disposition may be made of the full fee interest, excepting a reservation of oil and gas, but only of surface resources or a grant of "licenses, easements, rights-of-way, or similar interest in the land." Most important here, however, is the strong Congressional manifestation of protection of the naval petroleum reserves, which has been discussed, supra. This includes a prohibition against alienation of any part of the reserves save under certain stringent conditions. 10 U.S.C. § 7431 (1964). This Congressional policy protects the lands within the petroleum reserves, as well as the minerals, and circumscribes whatever discretionary authority the Secretary of Interior may have to grant allotment applications for lands within the reserves, assuming there are no other legal obstacles involved here. In the face of this manifested policy, we believe it would be an improper exercise of discretion to take any action looking toward allowance of these applications. 6/ Instead, the exercise of that discretion consistent with the Congressional policy compels us to reject these

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6/ It is unnecessary, therefore, to make further factual inquiry in these cases as would be necessary in order to entertain fully the legal questions posed by these applications. Cf. Navajo Tribe of Indians v. State of Utah, 72 I.D. 361 (1965). For example, we have indicated that consultation with the Department of Navy would be required before there could be any authorized recognition of rights in the land. A further question is whether native occupancy of land prima facie mineral in character because of the creation of the petroleum reserve could create any preference rights under the 1906 act which applied only to nonmineral lands prior to its amendment in August 2, 1956, or whether the applicants could establish that these lands were not in fact mineral in character prior to PLO 82. See Washburn v. Lane, 258 F. 524 (D.C. Cir. 1919); James Rankine (On Reconsideration), 46 L.D. 46 (1917); Solicitor's Opinion, 63 I.D. 346 (1956). See also 43 CFR 2093.3-3(e)(2) and 2093.4-1 (1971).

applications. 7/ As we have previously indicated, the rejection of these applications does not affect the natives' rights, otherwise, to use and occupy the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed with the modification that the applications are rejected for the reasons stated.

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Joan B. Thompson, Member

We concur:

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Frederick Fishman, Member (concurring specially)

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Francis Mayhue, Member (concurring specially)

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7/ We note that legislation has been proposed to settle the unresolved legal claims of Alaska natives based upon native aboriginal occupancy. Whether rights of the appellants under the Alaska Native Allotment Act are different from their asserted aboriginal native occupancy rights insofar as the effect of the petroleum reserve and the withdrawal by PLO 82 is a matter which need not be resolved here. Undoubtedly, Congress will weigh all of the equities of the occupants with other considerations of public policy to determine to what extent, if any, lands and mineral resources within NPR 4 may be formally authorized for the use and benefit of natives of Alaska, including appellants.

Frederick Fishman, concurring.

I concur in the result. It recognizes explicitly that the Secretary of the Interior, in exercising his discretion under the 1906 act, must take proper cognizance of the constraints embodied in 10 U.S.C. §§ 7421-38 (1964). However, as indicated in my concurring opinion in Lester Suvlu, 3 IBLA 125 (IBLA 70-91, 1971), and in Elsie May Pikok Crow, 3 IBLA 114 (IBLA 70-89, 1971), both decided today, I believe that Executive Order No. 3797-A barred the disposal of the surface, and that the occupancy of land presumptively valuable for oil and gas (up to the time of the 1956 amendments to the 1906 act) gave rise to no preference rights under the 1906 act.

Francis Mayhue, concurring.

I concur in the result for the reasons set forth in my decisions in Lester Suvlu, 3 IBLA 125 (IBLA 70-91, 1971), and Elsie May Pikok Crow, 3 IBLA 114 (IBLA 70-89, 1971), decided today.